Supreme Court, U.S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-1414

PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, JO SUZANNE MOSKOWITZ, a Minor, by Her Parents and Next Friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a Minor, by His Parents and Next Friends, John and Jeanne Hight, DAVID PREUSCH, a Minor, by His Parents and Next Friends, Calvin and Elizabeth Preusch, and CHARLES DiNOLFI, on Behalf of Themselves and All Others Similarly Situated,

Conditional Cross-Petitioners

v.

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Respondents

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

THOMAS K. GILHOOL
FRANK J. LASKI
MICHAEL CHURCHILL
1315 Walnut Street, Suite 1600,
Philadelphia, Pennsylvania 19107
(215) 735-7200

Counsel for Conditional Cross-Petitioners

March 12, 1980

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, JO SUZANNE MOSKOWITZ, a minor, by her parents and next friends, Leonard and Nancy Moskowitz, ROBERT HIGHT, a minor, by his parents and next friends, John and Jeanne Hight, DAVID PREUSCH, a minor, by his parents and next friends, Calvin and Elizabeth Preusch, and CHARLES DiNOLFI, on behalf of themselves and all others similarly situated,

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Respondents

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The conditional cross-petitioners Pennsylvania Association for Retarded Citizens, *et al.*, respectfully pray that

a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 13, 1979, the writ to issue only in the event this Court should grant a petition for writ of certiorari, if any, which may be filed this day by any Respondent herein.

Respondents herein, who appeared in part or in whole in an adverse position in the Court of Appeals, are Pennhurst State School and Hospital, the Department of Public Welfare of the Commonwealth of Pennsylvania, its Secretary, its Deputy Secretary for Retardation, its Commissioner of Retardation for the Southeast Region, the Superintendent of Pennhurst, the Pennhurst Parent-Staff Association, the County Commissioners, and the Retardation Administrator of Bucks, Chester and Montgomery Counties, the County Councilmen, Councilwomen and the Retardation Administrator of Delaware County and the Mayor, Councilmen, Councilwomen and the Retardation Administrator of Philadelphia County. Should any file a petition for certiorari this day, then, were it granted, conditional cross-petitioners here as well as another eight individual retarded people, the Parents and Family Association of Pennhurst, and the United States of America would be Respondents therein.

OPINIONS BELOW

The opinion of the Court of Appeals *en banc,* under the name of *Terri Lee Halderman, et al. v. Pennhurst State School and Hospital, et al.,* not yet reported, will have been attached as Appendix to any petition for certiorari filed by Respondents herein today. The opinion, judgment and orders of the District Court for the Eastern District of Pennsylvania which were before the Court of Appeals are reported at 446 F. Supp. 1295 (1977).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 13, 1979. This conditional cross-petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CROSS-QUESTIONS PRESENTED

1. Whether Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act prohibits further admissions to Pennhurst.

2. Whether Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act prohibits the use of Pennhurst as a residence for retarded people and requires thereby that Pennhurst be phased out.

STATUTORY PROVISIONS INVOLVED

The federal statute involved in this case, Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010, is set forth in the Appendix.

STATEMENT OF THE CASE

A full statement of the case by conditional cross-petitioners will appear in their brief in opposition to any petition for certiorari; if no petition for certiorari is filed, this conditional cross-petition will be withdrawn.

The Court of Appeals *en banc* "affirmed in all respects" the judgment of the trial court, "[w]ith the exception of the order to find employment for all Pennhurst employees, the order directing the eventual closing of Pennhurst, and the order banning all future admissions to Pennhurst." Slip Opinion at 67. This cross-petition would

place before the Court, in addition to whatever questions any petitioner may present and the Court allow a writ on, two parts of the judgment of the Court of Appeals: that vacating the order banning future admissions to Pennhurst and that vacating the order directing its eventual closing.

Jurisdiction arose in the District Court under 28 U. S. C. § 1343, the action being one to redress the deprivation of rights secured, inter alia, by 42 U. S. C. §§ 1983 and 6010 and by the Constitution, as well as under 28 U. S. C. § 1331. Jurisdiction of the state law ground arose by virtue of pendent jurisdiction.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Any Consideration of the Meaning of 42 U. S. C. § 6010 Should Be Fully Argued, the Relevant Whole of the Case Encompassed, and Plaintiffs Granted Additional Relief.

The Court of Appeals *en banc* had a single, unanimous view of the facts concerning the conditions of Pennhurst. In its *en banc* opinion, the Court of Appeals found:

> "Neither the Commonwealth nor the County defendants take serious issue with the court's findings of fact respecting the abominable conditions to which Pennhurst residents have been subjected." Slip Opinion at 16.

See also Slip Opinion at 17-18. As to the "abominable conditions to which Pennhurst residents have been subjected," the Court of Appeals' opinion and the dissent found common ground. In relevant particular, the dissent found:

> "Initially, I have no trouble agreeing with the majority that the conditions at Pennhurst revealed in this record fall below a statutory or constitutional threshold of decency so as to merit judicial intervention. The district court adequately documented the deplorable conditions at Pennhurst. . . . Understaffing, filth, violence, enforced inactivity, and other horrors make Pennhurst, in the opinion of one well-traveled expert, one of the worst institutions of its kind in the world. Under these circumstances the federal courts have a right and a duty to intervene and to secure for Pennhurst's residents, at the very least, adequate living conditions. . . . I thus have no hesitation in agreeing that the federal judiciary should

take the necessary steps to eliminate those conditions at Pennhurst." Slip Opinion at 67-68. (citations omitted) [1]

The only argument, if any, that can be raised against the judgment of the Court of Appeals in this Court therefore, concerns the duties Congress has required by statute law of public officials who provide services to retarded people. The Court of Appeals rested its judgment squarely on statutory grounds.[2] The Court of Appeals' construction of Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010, conditional cross-petitioners will submit in their brief in opposition, is clearly right. In addition to the rationale articulated by the Court of Appeals in its construction of the Act, there is another rationale, also clearly right, which would support the decision below but which might be deemed logically to lead to the entry of a judgment which "would . . . expand the relief . . . granted." *United States v. New York Tel. Co.*, 459 U. S. 159, 166 n. 8 (1977); *cf. Memphis*

1. The dissent also found that "given proper facilities all of these persons could be served 'in the community.'" Slip Opinion at 77.

The record to which both the dissent and majority refer was developed in 32 days of testimony before Judge Raymond J. Broderick with 80 witnesses (of whom half were offered by the plaintiffs and half by defendants), 27 depositions of defendants and their managing agents, 108 photographs, a three hour videotape film presented by defendants, and 288 documentary exhibits. The plaintiffs' witnesses included three experts retained by defendants to conduct a three month study of Pennhurst, 11 other experts, and 26 fact witnesses including 11 parents of Pennhurst residents and 3 retarded people who had formerly resided at Pennhurst.

2. In addition to the federal statute, the judgment was grounded independently in a state statute, the Pennsylvania Act of October 20, 1966, 50 Pa. Stat. Ann. §§ 4101 *et seq.* (Purdon 1969). There is no opinion of a state court in conflict; there are a score of state court decisions, many unreported, to the same effect. See, e.g., *In re Joyce Z.*, 4 Pa. D. & C. 3d 596 (C. P. Allegh. Co. 1975) (Maurice Cohill, J.).

Light, Gas & W. Div. v. Craft, 436 U. S. 1, 12 n. 12 (1978). Absent the allowance of certiorari on the cross-questions presented here, conditional cross-petitioners may be precluded in this Court from urging this additional rationale in support of the judgment below. Stern & Gressman, *Supreme Court Practice* 480-86 (5th ed. 1978) and cases cited therein.

The additional argument as to the construction of Section 111 and other federal statutes which conditional cross-petitioners would wish to make in the event this Court should grant any petition for certiorari is as follows. The meaning of Section 111, in pertinent particular, is that not necessarily all institutions are unlawful, not necessarily all retarded people must be elsewhere than an institution, but there are a set of institutions all of which are unlawful and into which no retarded person may be put. The face of Section 111 shows that to be the Congressional mandate, as does its legislative history. For example, the United States Senate Labor and Public Welfare Committee which originated consideration of the Bill of Rights provisions of the Act, speaks directly to the point:

> "It must be recognized that the vast majority of developmentally disabled persons and the vast majority of persons now institutionalized should not be in these institutions at all. Efforts to assure proper treatment, education, and habilitation services in large institutions should not deflect attention from the fact that most of these institutions themselves are anachronisms, and that rapid steps should be taken to phase them out. Many of these institutions by their very nature, their size, their isolation, their impersonality, are unsuitable for treatment, education, and habilitation programs." Senate Report No. 94-160, pages 32-33 (May 22, 1975).

The facts found below show that Pennhurst is one of this proscribed set of institutions. As applied to the record, the statute prohibits the use of Pennhurst as a residence for any retarded person.

Such an argument supports the judgment below. For example, in confiding to an individual determination whether a person needs an institution or whether his needs can be met in certain structured and supervised community living arrangements, and in stating standards to guide those determinations, the Court of Appeals held that if any person is found who can only be served in an institution, first resort under the Act must be had to an alternative other than Pennhurst. Slip Opinion at 65. The rationale of such an argument also "cuts further" and would require reversing that part of the Court of Appeals judgment which vacated the district court orders closing admissions to Pennhurst and requiring its phasing out. Hence the specification of the conditional cross-questions here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant any petition for a writ of certiorari in this matter, this cross-petition for a writ of certiorari should likewise be granted.

Respectfully submitted,

THOMAS K. GILHOOL
FRANK J. LASKI
MICHAEL CHURCHILL
1315 Walnut Street, Suite 1600,
Philadelphia, Pennsylvania 19107
Counsel for Conditional Cross-Petitioners

March 12, 1980.

APPENDIX

Statutory Provision Involved

Section 111 of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010.

Congress makes the following findings respecting the rights of persons with developmental disabilities:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty.

(3) The Federal Government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential program for persons with developmental disabilities that—

(A) does not provide treatment, services, and habilitation which is appropriate to the needs of such persons; or

(B) does not meet the following minimum standards:

(i) Provision of a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program.

(ii) Provision to such persons of appropriate and sufficient medical and dental services.

(iii) Prohibition of the use of physical restraint on such persons unless absolutely necessary and prohibition of the use of such restraint as a punishment or as a substitute for a habilitation program.

(iv) Prohibition on the excessive use of chemical restraints on such persons and the use of such restraints as punishment or as a substitute for a habilitation program or in quantities that interfere with services, treatment, or habilitation for such persons.

(v) Permission for close relatives of such persons to visit them at reasonable hours without prior notice.

(vi) Compliance with adequate fire and safety standards as may be promulgated by the Secretary.

(4) All programs for persons with developmental disabilities should meet standards which are designed to assure the most favorable possible outcome for those served, and—

(A) in the case of residential programs serving persons in need of comprehensive health-related habilitative, or rehabilitative services, which are at least equivalent to those standards applicable to intermediate care facilities for the mentally retarded promulgated in regulations of the Secretary on January 17, 1974 (39 Fed. Reg. pt. II), as appropriate when taking into account

the size of the institutions and the service delivery arrangements of the facilities of the programs;

(B) in the case of other residential programs for persons with developmental disabilities, which assure that care is appropriate to the needs of the persons being served by such programs, assure that the persons admitted to facilities of such programs are persons whose needs can be met through services provided by such facilities, and assure that the facilities under such programs provide for the humane care of the residents of the facilities, are sanitary, and protect their rights; and

(C) in the case of nonresidential programs, which assure the care provided by such programs is appropriate to the persons served by the programs.